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In The

# Supreme Court of the United States

October Term, 1997

IN RE THEODORE B. GOULD,

*Petitioner.*

**On Petition For Writ Of Mandamus To The United States Court Of Appeals For The Eleventh Circuit, Case No. 95-5351**

## BRIEF IN OPPOSITION OF RESPONDENT FRED STANTON SMITH, INDIVIDUALLY AND AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether mandamus should issue to review the court of appeals' decision affirming the bankrupcty court's determination that Respondent The Bank of New York is entitled to receive a Trustee's Certificate from Respondent Smith where the specific terms of a plan of reorganization confirmed in accordance with the United States Bankruptcy Code provides for such issuance and the plan in no longer subject to challenge?

2. Whether mandamus should issue to challenge the court of appeals' affirmance of the bankruptcy court's judgment in favor of Respondent Smith on Petitioner's cross-claims where those issues had previously been adjudicated in favor of Respondent Smith in other proceedings to which Petitioner was a party?

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## OPINIONS AND JUDGMENTS IN COURTS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit, App. at 3-11, the United States District Court for the Southern District of Florida, App. at 12-43, and the United States Bankruptcy Court for the Southern District of Florida, App. at 41-43, are unreported.

## JURISDICTIONAL STATEMENT

While this Court has jurisdiction pursuant to 28 U.S.C. § 1651 to "issue all writs necessary or appropriate in aid of [its] respective jurisdictions and agreeable to the usages and principles of law," including writs of mandamus, Petitioner has failed to satisfy this jurisdictional threshold for all of the reasons set forth in the argument section below. Petitioner's petition for writ of mandamus from the April 30, 1997 opinion of the court of appeals is timely, however.

## STATEMENT OF THE CASE

### Nature of the Case

This is a petition for writ of mandamus by Petitioner Theodore B. Gould, a debtor before the United States Bankruptcy Court for the Southern District of Florida, directed to the affirmance by the court of appeals of the bankruptcy court's final judgment and separate findings of fact and conclusions of law dated March 9, 1994, amended on rehearing by order dated March 31, 1995,

which (a) awarded Respondent The Bank of New York ("Bank") a Trustee's Certificate in the amount of $22,128,484.05, together with interest from February 6, 1991, (b) ruled in favor of Respondent Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust (collectively, "Trustee" or "Respondent Smith"), on Petitioner's cross-claims of conspiracy to commit fraud and breach of fiduciary duty, and (c) ruled in favor of Respondent Bank on Petitioner's counter-claims of fraud and conspiracy.

**Course of Proceedings and Facts**

Petitioner Gould and four entities that he "owned, controlled or dominated,"[1] were the developers of the Miami Center, a hotel, office building, shopping podium and parking garage in Miami, Florida. They filed simultaneous voluntary Chapter 11 petitions under the Untied States Bankruptcy Code on August 22, 1984, shortly after the Bank initiated foreclosure proceedings, owing over $350 million to some 400 creditors. App. 4.

One of the assets of Gould's bankruptcy estate was the Miami Center Joint Venture, a partnership between Gould and Olympia & York Florida Equity Corp. ("O&Y") created in 1981 in part to supply the furnishings, fixtures and equipment ("FF&E") at the Miami Center. In 1982, a dispute arose between the partners. They submitted the issues to arbitration, but the arbitration award was ultimately vacated because of Gould's bankruptcy on

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[1] *See Miami Center Ltd. Ptnshp. v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

the ground that the award failed to consider the rights of the parties in light of that event. *See Olympia & York v. Gould*, 776 F.2d 42 (2d Cir. 1985).

At the time the debtors filed their bankruptcy proceedings, the Bank and Miami Center Joint Venture ("MCJV") were the largest creditors. MCJV filed priority claims totalling millions of dollars against Gould, as well as a claim against debtor Miami Center Limited Partnership for unpaid rent and other monies due as the lessor of the FF&E used in the Miami Center. That claim is known as Claim 502. The Bank filed priority claims as the construction lender of the Miami Center project. App. 4.

The Bank and the debtors proposed competing plans of reorganization. The creditors voted "overwhelmingly" in favor of the Bank's plan, *Miami Center*, 838 F.2d at 1548, which the bankruptcy court confirmed on August 8, 1985 over the objections of the debtors, their affiliates and MCJV/O&Y. *Id.*

The confirmed plan created the Miami Center Liquidating Trust, consisting of all of the debtors' assets as defined by 11 U.S.C. § 541(a), and provided for the appointment of a trustee to administer the Trust. The plan also substantively consolidated the debtors' assets and liabilities. Respondent Smith, a stranger to the proceedings, was appointed Trustee shortly after confirmation of the plan. The Trustee's duties included the liquidation and payment of claims in the priority established by the plan. The plan equitably subordinated Claim 502 to a priority below not only the claims of the Bank, but of all other creditors except the debtors and their affiliates. The

plan also limited the total amount payable on Claim 502 to only $2 million.

The central provision of the confirmed plan was the sale of the Miami Center to the Bank for $255.6 million, the value fixed by an M.A.I. appraisal. That price *included* purchase of all of the FF&E which was the subject of Claim 502.[2] The purchase price was paid by cancellation of the Bank's $242 million mortgage lien and payment of the balance in cash, after adjustment for closing expenses.[3] That cash, together with other Trust assets, was used by the Trust to pay the claims of other creditors. Under the plan, all of the claims of the debtors and their affiliates, and all of the claims of MCJV, were subordinated to the claims of other creditors.

Two amendments to the plan were filed and approved by the bankruptcy court, only one of which is relevant here. The Second Amendment, submitted *prior* to

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[2] *In re Holywell Corp.*, No. 84-01590 slip op. (Bankr. S.D. Fla. January 29, 1986), *aff'd*, 59 B.R. 340 (S.D. Fla. 1986), *dismissed as moot sub nom., Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). *See also In re Holywell Corp.*, 874 F.2d 780, 782 (11th Cir. 1989), *cert. denied sub nom., Miami Center Ltd. Ptnshp. v. Bank of New York*, 493 U.S. 1022 (1990) (Issue of whether FF&E passed to Trustee was mooted where the transfer was part of confirmed plan which was substantially consummated).

[3] Petitioner takes issue with the fact that the Bank received a credit at the closing for post-petition interest on its claim and uses this allegation as a basis for his tort claims against Respondent Smith. The plan specifically provided for such payment and the debtors' collateral challenge to this plan provision failed years ago. *See Holywell Corp. v. Smith*, No. 88-151 slip op. (S.D. Fla. July 21, 1988).

confirmation, provided a mechanism for paying MCJV in the event there was a reversal of the treatment of Claim 502 under the plan. This amendment required the Bank and the Trustee to enter into a Funding Agreement by which the Bank would advance to the Trustee funds to pay Claim 502. In the event the Trustee looked to the Bank to fund payment, the Funding Agreement required the Trustee to issue a Trustee's certificate of indebtedness in favor of the Bank, secured by a lien upon all of the property of the Trust, which would be payable after creditors in classes one through six under the plan had been paid.

The bankruptcy court approved the Second Amendment without further notice to creditors, finding that no creditor other than the Bank would be adversely affected. The district court affirmed, concluding,

> In the last of their original issues on appeal, the debtors objected to the fact that late modifications to the Bank's Reorganization Plan were adopted shortly before entry of the Confirmation Order. These modifications. . . . consisted of stipulations and amendments to the plan as filed. The purpose of these modifications was to provide for a trustee's certificate to repay the Bank of New York for any outlay required to acquire the FF&E which was the subject of [Claim 502]. The Bankruptcy Court concluded (Order on Remand, paragraph No. 81) that these modifications did not prejudice the debtors, and that since the plan had been approved by the requisite number of creditors, disclosure to those classes which had rejected the plan was not required by 11 U.S.C. § 1127.

> This Court agrees with the Bankruptcy Court's conclusion that the adoption of amendments to the plan of reorganization subsequently confirmed by that court did not violate the applicable provision of the Bankruptcy Code, did not prejudice these appellants, and therefore does not constitute a basis for reversing the Confirmation Order.

*Holywell Corp. v. Bank of New York*, 59 B.R. at 352. In its original confirmation order, the bankruptcy court held that the Second Amendment "in effect guarantees payment in full of the O&Y claim." *In re Holywell Corp.*, 54 B.R. 41, 42-43 (Bankr. S.D. Fla. 1985). There is no dispute that Petitioner, his co-debtors, and all creditors received notice of the August 8, 1985 order confirming the plan, as amended, as well as the January 29, 1986 Order on Remand in which the bankruptcy court entered detailed findings of fact and conclusions of law to support the confirmation order.

The debtors' appeal to the court of appeals was dismissed as moot on the ground that no effective relief could be granted because the plan had been substantially consummated and could not be undone. *See Miami Center*, 838 F.2d 1547 (11th Cir. 1988). This Court denied certiorari and mandamus. *See Miami Center*, 488 U.S. 823 (1988) (denial of certiorari) and *In re Gould*, 488 U.S. 814 (1988) (denial of mandamus).

MCJV separately appealed the plan and limited its appeal only to the treatment of Claim 502 under the plan. MCJV's appeal was successful.[4] *In re Holywell Corp.*, 913

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[4] The debtors' appeal of the confirmation order specifically excluded the treatment accorded Claim 502 under the plan.

F.2d 873 (11th Cir. 1990). During the pendency of that appeal, MCJV moved to stay implementation of the plan. On October 4, 1985, the district court denied the stay, but ordered the Bank to post a $15 million corporate surety bond because it deemed the Funding Agreement by itself insufficient to protect the interests of MCJV if the subordination of Claim 502 was reversed.

The Bank posted the bond and the plan was implemented on October 10, 1985 by the sale of the Miami Center, along with the FF&E, to the Bank's nominee. At the closing, the Trustee signed a Funding Agreement which was modified to reflect the district court's order requiring a bond to back up the agreement. Just as the Funding Agreement approved as part of the Second Amendment, the agreement signed at the closing provided that the Bank would advance the funds necessary to pay Claim 502 if a final order was entered increasing the amount fixed in the plan to pay the claim. In such an event, the Bank would receive a Trustee's Certificate in return. However, the Funding Agreement signed at the closing also provided that if the Bank was required to pay Claim 502 "from any source other than under the Funding Agreement for any reason whatsoever, including but not limited to court order, then it shall have no obligation to fund any sums hereunder but shall be entitled to receive a Trustee's certificate, as provided in paragraph 3 hereof, for such payments as if such payments had been

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*Miami Center, supra.* It did not, however, exclude the plan of reorganization's treatment of the Second Amendment. *See Miami Center,* 838 F.2d 1547 (11th Cir. 1988).

made pursuant to this Funding Agreement." This modification recognized the Bank's right to a Trustee's Certificate regardless of whether the Bank paid Claim 502 via the Funding Agreement or under its surety bond. App. 7-8.

In MCJV's appeal of the amended confirmation order, the court of appeals reversed the treatment of Claim 502 under the plan. In reversing the equitable subordination of MCJV's claim, the district court concluded,

> Because the parties are in substantial disagreement regarding the payment of the claim, I feel compelled to resolve this point. O&Y should be paid:
>
> (1) First, from the cash which remains available to the trustee;
>
> (2) Second, from any property controlled by the trustee including Gould's interest in MCJV; and
>
> (3) Finally, from the surety bond provided by the Bank to guarantee O&Y's payment under the plan.

On May 8, 1987, in proceedings on remand from that ruling, the bankruptcy court fixed the amount of the claim at $14,557,754, representing the past due rent on the FF&E, the purchase option price of the FF&E, late charges and penalty interest, and interest at the lease rate of 4% above the prime rate charged by Citibank. *In re Holywell Corp.*, 75 B.R. 793, 796 (Bankr. S.D. Fla. 1987).

In further proceedings on remand, the Trustee filed an adversary complaint to determine from which of the three sources set by the district court Claim 502 would be

paid. The bankruptcy court determined that the Trust lacked available cash, that the value of Gould's interest in MCJV was indeterminable and thus illusory, and therefore concluded that the Bank's bond was to be the source of payment. The court of appeals affirmed. *In re Holywell Corp.*, 913 F.2d 873, 878 (11th Cir. 1991). The court of appeals also affirmed the district court's determination that the plan improperly subordinated the claim of MCJV. *Id.*

The next step in this tortured history was taken by Respondent Bank, which filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate the ruling that Claim 502 was to be paid from the Bank's bond. The Bank argued unsuccessfully that the Trust had funds available to pay the claim from its own assets. After the bankruptcy court denied the motion, the Bank paid $22,335,882.13 on March 18, 1991 to satisfy Claim 502.[5]

Thereafter, the bankruptcy court entered an order which required the Trustee to issue a Trustee's Certificate in favor of the Bank for the full amount paid. The Trustee appealed the amount; the Debtors, MCJV, and the federal government appealed the Bank's entitlement to a certificate.

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[5] Although the Funding Agreement and court-ordered bond were limited to an amount below this sum, it was judicially determined to cover the full amount of the claim. *See Holywell*, 913 F.2d at 878 n.9. The bankruptcy court reduced the amount awarded under the Trustee's certificate to the amount of the claim on the date of the court of appeals' mandate, holding the Bank independently responsible for the interest which accrued while the Bank's Rule 60(b) motion was pending.

While these issues were pending before the district court, this Court decided *Holywell Corp. v. Smith*, 503 U.S. 47 (1992), which held the Trust responsible for the income tax consequences of the reorganization plan even though the plan did not contain any provision for such taxes.

After the Trustee consummated settlements of the tax obligations of the Trust (over Petitioner Gould's objections), both the Trustee and the Bank filed separate motions directed to the issue of the Trustee's Certificate. Respondent Bank re-filed its motion in the form of an adversary complaint. Petitioner Gould pursued fraud and conspiracy claims against Respondent Bank and Respondent Smith, individually and as Trustee, regarding the Funding Agreement and the payment of post-petition interest to the Bank upon implementation of the plan at the closing of the sale of the Miami Center. Both the Trustee and the Bank argued that the plan provisions required the issuance of a Trustee's Certificate and bound the parties because of (a) the confirmation order, (b) the bankruptcy court's January 29, 1986 Order on Remand of the confirmation order, and (c) two decisions of the court of appeals which were predicated in part on the Bank's entitlement to a Trustee's Certificate. *See Miami Center Ltd. Ptnshp. v. Bank of New York* , 838 F.2d 1547, 1549 and 1555-56 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988); *In re Holywell Corp.*, 913 F.2d 873, 877 (11th Cir. 1990).

On March 9, 1994, the bankruptcy court entered a final judgment awarding the Bank a Trustee's Certificate in the amount of $22,128,484.05, effective as of February 6, 1991, on the ground that the plan provided for the Bank to receive a Trustee's Certificate if it satisfied Claim 502 on behalf of the Trust. The bankruptcy court rejected

Petitioner's claims of fraud and conspiracy, finding that there was no competent evidence to support the allegations. The court also rejected the argument that the Bank was independently responsible for some $11 million in interest which accrued while the treatment of Claim 502 under the plan was being litigated (the Trustee did not contest issuance of a certificate for the principal amount of the claim), holding that the delay in payment of Claim 502 was attributable to the actions of all parties and not just those of the Bank. The court noted that earlier relevant decisions determined that the amount of the Trustee's Certificate should be the amount of any funds advanced by the Bank to pay Claim 502 pursuant to the Second Amendment to the plan.

As to Petitioner's cross-claims against the Trustee, the court ruled that because the plan bound the Trustee to honor the Second Amendment, there could be no wrongdoing for having carried out that mandate; that the four-year limitation imposed by Florida Statute § 95.11(3)(i) and (o) barred the cross-claims; and that Bankruptcy Code § 1144, 11 U.S.C. § 1144, which requires any claim for fraud under a plan of reorganization to be brought within 180 days of confirmation, also barred the cross-claims.

Petitioner's motion to stay the bankruptcy court's decision was denied. The district court affirmed in part and reversed in part. The court affirmed the dismissal of Petitioner's claims against Respondent Bank and Respondent Smith and concluded that the Bank was entitled to a Trustee's Certificate, but held "the only issue that merits discussion. . . . is whether the Trustee's Certificate awarded by the bankruptcy judge was in the correct

amount," and adopted the pertinent findings of fact and conclusions of law entered by the lower court. App. 15. Although the district court affirmed the bankruptcy court's determination that unpaid rent and late charges should be included in the Trustee's Certificate, the court remanded the matter for further evidentiary hearings on the issue of whether the Bank had in fact paid the purchase price of the FF&E when it purchased the Miami Center pursuant to the plan in 1985. The bankruptcy court held a hearing on remand and entered a final judgment on remand with separate findings of fact and conclusions of law. App. 44 and 47. Thereafter, the district court entered a Final Judgment Affirming the Bankruptcy Court's Findings, holding that the record on remand supported the bankruptcy court's ruling. App. 12. Petitioner Gould and Holywell Corporation appealed to the court of appeals, which affirmed. App. 3. Gould's petition for writ of mandamus followed.

## SUMMARY OF ARGUMENT

Petitioner has entirely failed to satisfy the jurisdictional basis for the granting of a writ of mandamus. Mandamus is a drastic remedy granted only under extraordinary circumstances, none of which are present in the case *sub judice*. There is no demonstration that the opinion of the court below departs in any manner from factually and legally substantiated standards, nor does Petitioner show any extraordinary grounds for granting the writ. The court of appeals did not err in affirming the final judgment ordering the issuance of a Trustee's Certificate to the Bank for $22.1 million. The confirmed plan of

reorganization and relevant court orders all provide that the Bank is entitled to a Trustee's Certificate for advancing the funds needed to pay Claim 502. It is the law of this case. Petitioner is thus precluded from re-litigating the plan provision at issue here.

In light of the terms of the confirmed plan and applicable court orders, the court of appeals also not err in affirming the judgment in favor of the Trustee on Petitioner's cross-claims of breach of fiduciary duty and conspiracy to commit fraud regarding the Trustee's Certificate and the payment of post-petition interest to the Bank on its mortgage claim. There is no legally cognizable theory to support Petitioner's contention that the Trustee is liable in tort for having carried out the mandate required by the confirmed plan. Given that collateral challenges to the plan are barred, Respondent Smith cannot be held liable for carrying out its terms.

Even if the law of the case did not prevent such challenges to the confirmed plan, the applicable Florida and Bankruptcy Code statutes of limitations bar the cross-claim. The cross-claim was filed at least eight years after the events about which the debtors complain. This is substantially beyond the statutes of limitation, and Petitioner failed to offer any credible theory to prove the tolling of the limitations period.

All of these reasons aside, the judgment in favor of Respondent Smith was properly affirmed because there was no competent proof of any wrong-doing. Petitioner's sole evidence consisted of the plan and court orders. Petitioner Gould did not present any legally cognizable

evidence that the Trustee engaged in any action in derogation of the plan or of court orders. He is arguing that the plan should not have been confirmed and that the Trustee is liable for having carried out its terms. The doctrine of derived judicial immunity prevents the Trustee for being held liable for implementing his court-mandated duties.

Petitioner has not shown any extraordinary grounds that warrant granting the writ. For all of these reasons, the petition for writ of mandamus should be denied.

## ARGUMENT

### I.

### REASONS FOR DENYING THE WRIT

### A. PETITIONER FAILS TO DEMONSTRATE ANY EXTRAORDINARY GROUNDS FOR GRANTING THE WRIT OF MANDAMUS

Petitioner Gould fails to demonstrate that the court of appeals departed from accepted standards in any way. This Court gives great weight to the court of appeals' construction of the judgment on review. *See Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986). The opinions of the courts below all conform to well established legal principles recognized by all of the circuits and do not offer any reason for further review. Petitioner's contention that the plan is not binding because it was confirmed without notice and hearing, and because the court of appeals' 1988 dismissal of his appeal of the plan as moot was an abandonment of the court's duty, is specious at

best and deliberately misrepresentative of the facts and history of this case. *See* App. 8-9. Notably, this Court denied Petitioner Gould's petitions for writs of certiorari and mandamus from the court of appeals' mootness decision almost a decade ago. *See Miami Center*, 488 U.S. 823 (1988) (denial of certiorari) and *In re Gould*, 488 U.S. 814 (1988) (denial of mandamus).

"To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack an adequate alternative means to obtain the relief they seek, and carry the burden of showing that their right to issuance of the writ is clear and indisputable." *Mallard v. U.S. District Court for the S. District of Iowa*, 490 U.S. 296, 309 (1989) (citation omitted). This Court has held that the " . . . remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy. . . . [T]his court has required that a party seeking issuance of [the writ of mandamus] have no other adequate means to obtain the relief he desires, and that he satisfy the burden of showing that his right to issuance of the writ is *clear and indisputable.*" *Id.* at 35 (emphasis supplied).

Petitioner Gould entirely fails to meet this burden, as the following discussion of the issues and applicable law demonstrates.

**1. The court of appeals did not err in affirming the bankruptcy court's decision that Respondent Bank is entitled to a Trustee's Certificate under the terms of the plan of reorganization.**

It is the law of this case that the plan of reorganization provides for the issuance of a Trustee's Certificate under the Second Amendment once the Bank was required to pay Claim 502.

The August 8, 1995 confirmation order specifically confirmed the Second Amendment, 54 B.R. at 41; so did the bankruptcy court's Order on Remand of January 20, 1986, in which the court entered detailed findings of fact and conclusions of law supporting the confirmation order. At the hearing on remand from the debtors' appeal of the confirmation order, which resulted in the Order on Remand of January 29, 1986, the debtors requested and received an evidentiary hearing on certain issues regarding the plan. They did *not* request an evidentiary hearing on the Second Amendment, which was expressly approved in the confirmation order. As to that amendment, the bankruptcy court held that no hearing was necessary because no party was adversely affected. The debtors appealed the amended confirmation order. The district court affirmed, the court of appeals dismissed the appeal, and this Court denied certiorari and mandamus. *Miami Center*, 838 F.2d 1547 (11th Cir. 1988), *cert. denied*, 488 U.S. 823 (1988); *In re Gould*, 488 U.S. 814 (1988). The Second Amendment is, therefore, the law of the case. *See Arizona v. California*, 460 U.S. 605, 618 (1983); *United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559 (11th Cir. 1992); *Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506 (11th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

"Unlike the more precise requirements of *res judicata*, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona*, 460 U.S. at 618 (1983), *quoting* 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.404 (1982). "The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members . . . " *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967).

Regrettably, that is exactly what has happened in this case. Petitioner Gould, acting alone or with his controlled companies, has pursued fifteen petitions to this Court and well over 130 appeals *in toto* since he sought bankruptcy protection in 1984. The majority of these appeals, including this petition, involve collateral attacks on the confirmed plan. "Law of the case precludes re-litigation of issues decided by necessary implication in an earlier proceeding." App. 8, *citing In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1550 n. 3 (11th Cir.), *cert. denied*, 498 U.S. 959 (1990). " . . . an issue once decided by a competent court is *conclusive*." *Arizona*, 460 U.S. at 619 (emphasis supplied).

This Court has held that "[a]lthough we have been reluctant to import wholesale law-of-the-case principles into original actions [citations omitted], prior rulings in such cases should be subject to the general principles of

finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992). Petitioner Gould has not shown any changed circumstances or unforeseen issues that warrant re-writing the terms of the plan this many years after its confirmation and substantial consummation. He has had many opportunities to challenge the plan and has received more than his fair share of appellate review.

Petitioner Gould seeks to evade this problem by arguing that the Funding Agreement is not enforceable because it is not exactly the same as the form proposed by the Second Amendment to the plan of reorganization. This argument is without merit. The Second Amendment provides that the Funding Agreement and Trustee's Certificate shall be in "substantially" the same form as attached thereto. The Funding Agreement signed at the closing differs from the proposed Funding Agreement attached to the Second Amendment to reflect the district court's order requiring the Bank to post a bond to back up the Funding Agreement. The court of appeals was correct in ruling that this change in form does not invalidate the Second Amendment or the signed Funding Agreement.

The court of appeals' mootness decision, reported at 838 F.2d 1547, addressed the effect of the bond and the Funding Agreement. The court held that the right to a Trustee's Certificate was a plan provision for which the Bank bargained as part of its purchase of the Miami Center, and if no Trustee's Certificate were to issue, then the Bank would involuntarily pay twice for the same

property. *Miami Center*, 838 F.2d at 1549. This plan provision is thus not subject to further challenge.

Petitioner Gould nonetheless argues that the Second Amendment to the plan is void because no hearing was held before it was approved. He asserts this despite the fact that the district court remanded the confirmation order for entry of findings of fact and conclusions of law, and the bankruptcy court conducted an evidentiary hearing at which the debtors failed to raise the issue of the Second Amendment or request a hearing on that point. Further, Petitioner does not dispute that he received notice of the hearing on remand and the Order on Remand dated January 29, 1986. Nor can Petitioner dispute that this Court already rejected his arguments back in 1988 when the Court denied certiorari and mandamus from the madness decision. For all of these reasons, Petitioner Gould's arguments lack credibility.

**2. The court of appeals affirmance of the bankruptcy court's judgment in favor of the Trustee on Petitioner's cross-claims was not an abandonment of the court's duty.**

Petitioner Gould entirely failed to adduce competent proof that Respondent Smith breached any fiduciary duty, committed any fraud, or conspired with the Bank regarding the Trustee's Certificate or the plan. Petitioner Gould fails to overcome the applicablitiy of the doctrine of law of the case and the statute of limitations, which bar recovery against the Trustee. Moreover, in a case involving questions of fact and law, and where the acts complained of may be valid or void depending on parole

evidence, mandamus is not the proper remedy. *See United States v. The Commissioner*, 72 U.S. 63, 5 Wall. 563, 563 (1866).

**a. The court of appeals correctly determined that Petitioner could not relitigate the validity of the plan in order to hold Respondent Smith liable for having carried his duties under the plan.**

In its dismissal of the debtors' appeal of the plan, the court of appeals found,

> Moreover, the Bank was required to set aside $14 million, backed by surety bonds, to protect the rights of creditors affiliated with Gould [referring to MCJV], who had been found in a separate order to be lessors of equipment and fixtures located in Miami Center that had been included with the sale to the Bank. This order was the subject of a separate appeal. Should the Bank ultimately have to pay the lessors for the FF&E under this arrangement it would be entitled to seek reimbursement from the estate pursuant to a trustee's certificate.

*Miami Center*, 838 F.2d at 1549. The court of appeals ruled that this is part of what the Bank bargained for, and because it is too late to undo the plan, the debtors' appeal of the confirmation order should be dismissed. *Id.* Petitioner Gould is bound by that result because it is the law of the case. *See, e.g., Arizona*, 460 U.S. at 618; *Wyoming*, 502 U.S. at 446. Petitioner offers no credible theory to contradict the fact that if the confirmed plan required a Trustee's Certificate, there can be no claim of wrong-

doing on the part of the Trustee in having issued one to the Bank.

Petitioner Gould argues that the court of appeals' references to the Trustee's Certificate are merely *dicta* and that the debtors' appeal of the confirmation order excluded the plan's treatment of Claim 502 (which was separately appealed by MCJV/O&Y). This is a disingenuous reading of the case. The court of appeals specifically considered what would happen if the relief sought by the debtors were granted, *Miami Center*, 838 F.2d at 1556:

> The Bank bargained for and purchased the FF&E as part of the sale. Because litigation was in progress over whether title to the FF&E was in lessors of the bankrupt, the Bank put up $14 million to pay the lessors if they prevailed. But since the Bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from double payment. Without the trustee's certificate, if double payment ensues, the Bank will become an unsecured creditor to the extent of some $14 million. The debtors do not suggest any relief for this risk.

In the district court's affirmance of the confirmation order, with respect to the Second Amendment, the court noted,

> The purpose of these modifications was to provide for a trustee's certificate to repay the Bank of New York for any outlay required to acquire the furniture, fixtures, and equipment which was the subject of [Claim 502].

*Holywell Corp. v. Bank of New York*, 59 B.R. 340, 342 (S.D. Fla. 1986).

In the separate appeal by MCJV/O&Y of the plan's treatment of Claim 502, the court of appeals held,[6]

> Because the plan's classification of MCJV and the amount of Claim 502 was still in dispute as of this date, the Bank of New York executed a Funding Agreement in which it agreed to advance up to the full amount of Claim 502 to the liquidating trustee in the event MCJV's classification was reversed. The trustee, in turn issued to the Bank a trustee's certificate for the amount if any funds advanced by the Bank pursuant to the Funding Agreement.[7]

*In re Holywell Corp.*, 913 F.2d 873, 877 (11th Cir. 1990).

These decisions are the law of this case and bar Petitioner Gould's cross-claims against the Trustee.

In addition to the allegations regarding the Second Amendment to the plan, Petitioner Gould has also accused the Trustee of breach of fiduciary duty and conspiracy to commit fraud regarding the $27 million in post-petition interest received by the Bank at the closing on the sale of the Miami Center. The plan of reorganization specifically provided for the payment of such interest (Plan, Articles III and IV), Petitioner's challenge to the plan was not successful, and his subsequent collateral challenge to this particular feature of the plan also failed.

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[6] The debtors were parties to this appeal, as well.

[7] When this decision was rendered, the Trustee had signed the Funding Agreement but had not issued a Trustee's Certificate because the Bank had not yet paid Claim 502.

*Holywell Corp. v. Smith*, No. 88-151 slip op. (S.D. Fla. July 21, 1988). Accordingly, this claim is barred.

**b. The statutes of limitation bar the cross-claims.**

Petitioner's claims of impropriety concerning both the Trustee's Certificate and post-petition interest are barred by the applicable Florida statute of limitations.

The plan, including the Second Amendment, was confirmed on August 8, 1985. The bankruptcy court entered its Order on Remand re-confirming the plan on January 29, 1986. Each of these decisions approved the Second Amendment and were appealed unsuccessfully by the debtors without a stay. Further, the evidence was uncontroverted that shortly after the October 10, 1985 closing of the sale of the Miami Center, the debtors were provided with all of the executed closing documents, including the Funding Agreement.

Florida Statute § 95.11(3) (i) and (o) mandates a four-year statute of limitations on claims of fraud and conspiracy. As the debtors first learned of their claims as early as August, 1985 (confirmation) and no later than 1986 (both the Order on Remand and receipt of the executed closing documents), and they filed their cross-claims against the Trustee in 1994, the statute of limitations clearly bars their claims.

Bankruptcy Code § 1144 also acts as a statute of limitations here. That section places a 180-day time limitation on claims of fraud with respect to a plan of reorganization. Under § 1144, the cross-claim would have had to have been filed no later than 1986 to be viable.

Petitioner contends, however, that the statute of limitations is tolled because the torts were continuing in nature. This argument is without merit. In actions for injuries or loss resulting from a wrongful act, the cause of action generally accrues and the statute of limitations "begins to run from the time the injury is first inflicted, not from the time the full extent of the damage has been ascertained." 35 Fla.Jur.2d § 60 *Limitations & Laches, citing, e.g., Seaboard A.L.R. Co. v. Ford*, 92 So.2d 160 (Fla. 1957).

> It is not material that all the damage resulting from the act have [sic] not been sustained at that time. The running of the statue is not postponed by the fact that actual or substantial damage does not occur until a later date . . . The statute attaches only when there has been notice or knowledge of some invasion of a legal right of the plaintiff.

Petitioner's effort to evade this problem by arguing that the torts were "continuing" in nature is specious. There were no such allegations in the cross-claim nor was there any such proof at trial. The exception argued by Petitioner applies only where *separate and successive actions* would lie for the damages as they accrue.

It is clear in this case that there was no continuing tort which would toll the statute of limitations. In determining whether a "continuing wrong" exists, for purposes

of tolling limitations periods, the focus should be on the purported wrongful activities, and upon the complaining party's alleged suffering; if the defendant's activities do not constitute a continuing violation, the doctrine does not apply regardless of whether the plaintiff's harm from the defendant's initial violation continues. *See United Airlines, Inc. v. Evans*, 431 U.S. 553, 558-559 (1977); *New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507 (S.D. Fla. 1988); *Blue Dolphin, Inc. v. U.S.*, 666 F.Supp. 1538 (S.D. Fla. 1987) (Doctrine of "continued wrongful acts" triggered by repeated wrongs, not by subsequent damage).

The acts complained of by Petitioner were discrete and all occurred a decade before the cross-claim was filed. The sole "continuing" act is that the Trustee has continued to maintain that his actions in 1985 and 1986 were required by the confirmed plan and court orders. Under these circumstances, there was no continuing violation. The statute of limitations was not tolled and it bars the cross-claim.

**c. There was no evidence of wrong-doing by the Trustee.**

Petitioner offered no proof of wrong-doing on the part of the Trustee. His "evidence" consisted of the plan, the Second Amendment, the Funding Agreement, and an indemnity agreement between the Bank and the Trustee signed at the closing on the sale of the Miami Center. In this case, Petitioner alleges that the Trustee is liable in tort for (a) having signed the Funding Agreement, (b) having granted the Bank a credit for $27 million upon the implementation of the plan at the closing on the sale of

the Miami Center, representing post-petition interest on the Bank's claim, and (c) having disbursed Trust assets to creditors in 1985 and 1986 pursuant to the plan. It is claimed that the Trustee did these things without seeking instructions from the bankruptcy court for what Petitioner has termed flaws in the plan. These allegations are made despite the fact that the plan was confirmed, no stay was in effect to preclude its implementation, and Petitioner's appeal of the plan was unsuccessful.

In effect, Petitioner asserts that the Trustee is liable for damages for having carried out the plan instead of challenging its merits before he implemented it. This argument ignores the fact that no stay was in effect. The position is absurd and has been rejected repeatedly. *See, e.g., In re Holywell Corp.*, 93 B.R. 780 (S.D. Fla. 1988). The Trustee's duty is to administer the plan as it was confirmed, not to attack the confirmation order.

The contention that the signed Funding Agreement or the payment of post-petition interest on the Bank's claim constitutes evidence of malfeasance is also baseless. As the plan and court orders provided for such actions, the Trustee cannot be liable in tort for having acted accordingly.

**d. Derived judicial immunity bars the cross-claims against the Trustee.**

Assuming *arguendo* that the plan is flawed as Petitioner Gould claims, the Trustee may not be held liable for having carried out the court's mandate. *See In re Jackson*, 105 B.R. 542, 544-45 (9th Cir. B.A.P. 1989) (a trustee or an official acting under the authority of the

bankruptcy court is entitled to derived judicial immunity because he is performing an integral part of the judicial process). *See also Holywell Corp. v. Smith*, No. 87-0627 slip op. (Bankr. S.D. Fla. September 30, 1993) *aff'd*, No. 94-0111-Civ-Aronovitz (S.D. Fla. October 12, 1993). Moreover, mandamus may not be used as a substitute for appeal to dictate the manner of a judicial officer's actions. *See I.C.C. v. U.S. ex rel. Campbell*, 289 U.S. 385, 394-95 (1933).

## CONCLUSION

For all of the foregoing reasons, the petition for writ of mandamus should be denied.

Respectfully submitted,

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